

IN THE UNITED STATES COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION

UNITED STATES, for the use and benefit of  
LEHON YOUNG, d/b/a YOUNG'S ELECTRIC SERVICE

PLAINTIFF

V.

CAUSE NO. 4:93CV200-B-O

MET-PRO CORPORATION and  
INTERNATIONAL FIDELITY INSURANCE COMPANY

DEFENDANTS

**MEMORANDUM OPINION**

This cause is presently before the court on the motion of International Fidelity Insurance Company (Fidelity) for summary judgment. Upon consideration of the motion, the plaintiff's response thereto and the affidavits and memoranda submitted by the parties, the court is prepared to rule.

This cause is brought under the auspices of the Miller Act. 40 U.S.C. § 270 et. seq. The plaintiff alleges that the defendant Met-Pro Corporation (Met-Pro) has breached its contract in which it was to pay Young's Electric Service for certain services rendered and materials furnished, and that the defendant Fidelity must now pay on that claim as the surety for Met-Pro under the Act. 40 U.S.C. § 270b(a). The plaintiff also has state law claims of quantum meruit, breach of contract, and intentional infliction of emotional distress, brought under this court's supplemental jurisdiction. 28 U.S.C. § 1367.

## FACTS

Met-Pro was the general contractor on a construction project undertaken on behalf of the United States Army Corps of Engineers for the Greenville, Mississippi Air Force Base. Met-Pro contracted with various subcontractors, including Young's Electric Service, to supply materials and labor on the project.

In accordance with the Miller Act, Fidelity issued a payment bond, dated April 20, 1992, on behalf of Met-Pro, naming the United States of America as obligee and covering the work undertaken by Met-Pro on the Air Force Base. The payment bond was in the amount of \$84,150.

Met-Pro failed to pay all persons providing labor and materials for use in the Greenville, Mississippi Air Force Base project, and Fidelity, as Miller Act surety for Met-Pro, paid claims totaling \$89,087.93 on its payment bond. According to the affidavit of Frank J. Tranzola, Assistant Claims Counsel for Fidelity, payments were made as follows:

5/3/93	Grinder Excavating	\$18,728.87
6/7/93	Browning Ferris Ind.	\$37,463.70
6/17/93	Stribling Equipment Co.	\$ 7,605.80
7/21/93	Attala Lining Systems	\$ 3,489.56
9/29/93	W.A. Hanos Excavators	\$20,000.00
10/14/93	Hall's Wrecker Service	\$ 1,800.00

The plaintiff filed this action on July 14, 1993; however, Fidelity was not served with the summons and complaint until November 10, 1993, or shortly thereafter.<sup>1</sup>

---

<sup>1</sup>The court does not appear to have personal jurisdiction over defendant Met-Pro as no service of process has been returned or appearance made in its behalf. Therefore, the court does not include this defendant in its ruling -- Met-Pro is not a party to

### STANDARD FOR SUMMARY JUDGMENT

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be resolved in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986). The court here finds no factual dispute

---

this action.

which would preclude a grant of summary judgment to the defendant.

### **DISCUSSION**

The defendant bases its motion for summary judgment, insofar as it relates to the federal claims, on three grounds: (1) the defendant's extent of liability is the penal sum of the bond; (2) the claim is barred because the required ninety (90) day notice was not given; and (3) the claim is barred by the applicable statute of limitations. As there is no genuine dispute as to these material facts, the court finds that each is an equally appropriate ground for summary judgment.

The Fifth Circuit Court of Appeals has held that a surety is not liable for an amount greater than the sum of the penal bond. Bill Curphy Co. v. Elliott, 207 F.2d 103, 106 (5th Cir. 1953). The court reasoned that if this were not the case, "it would be futile to state any amount of liability on the bond." Id. Furthermore, the court stated that "the sole object of stating the penalty in a bond is to fix the limit of the liability of the signers, and no recovery can be had on such a bond against the principle or surety beyond the penalty named in the bond." Id. See also Massachusetts Bonding & Ins. Co. v. United States, 97 F.2d 879, 881 (9th Cir. 1938); Aetna Casualty and Sur. Co. v. Butte-Meade Sanitary Water Dist., 500 F. Supp. 193, 197 (D.S.D. 1980); Pennsylvania Fire Ins. Co. v. American Airlines Inc., 180 F. Supp. 239, 241 (E.D.N.Y. 1960). Thus, as Fidelity has fully discharged its payment bond in favor of other claimants before learning of the Young's Electric claim, it is not liable for any unpaid claims beyond the penal sum

named in the bond.

Incredulously, the plaintiff cites to Houston Fire & Casualty Ins. Co. v. E.E. Cloer Gen. Contractors, 217 F.2d 906 (5th Cir. 1954), as implicitly overruling Bill Curphy. The court would suggest to the plaintiff a re-reading of that case with particular attention paid to the last two sentences of the opinion. "There is here no question as to the limits of such liability. Cf. Bill Curphy Co. v. Elliott, supra. The surety's obligation is of course limited to the penal sum named in the bond." Houston Fire & Casualty, 217 F.2d at 912.

Additionally, the defendant contends that notice of the claim was not given to Met-Pro (or Fidelity) as required by the Miller Act. 40 U.S.C. § 270b. This provision requires as a strict condition precedent to filing suit that notice be given to the principle contractor within 90 days from the date on which the claimant debtor performed the last of the labor or furnished or supplied the last of the materials for which the claim is made. 40 U.S.C. § 270b(a); United States for the Use and Benefit of Kinlau Sheet Metal Works Inc. v. Great America Ins. Co., 537 F.2d 222, 223 (5th Cir. 1976); Chicago Rigging Co. v. Uniroyal Chemical Co., Inc., 718 F. Supp. 696 (N.D. Ill. 1989) (although remedial in nature and should be construed liberally to effectuate purpose, giving notice and bringing suit within prescribed time is condition precedent to a Miller Act cause of action). The plaintiff has not provided any evidence to this court of notice being given to Met-Pro. Indeed, the only notice to Met-Pro or Fidelity was the filing

of this suit. Request for Admission No. 2, infra. Clearly, the 90-day notice period had expired and, thus, the principle and the surety are no longer obligated to pay for Young's Electric's services.

Lastly, the court finds that the plaintiff has not commenced this action within the one-year limitations period of 40 U.S.C. § 270b(b).<sup>2</sup> This sub-section states that "no suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied . . . ." 40 U.S.C. § 207b(b); United States ex rel. Dover Elevator Co. v. General Ins. Co., 339 F.2d 194, 195 (6th Cir. 1964) (one year time limit is condition precedent to bringing suit under Miller Act). In fact, the plaintiff has admitted to as much. On or about August 23, 1994, the defendant sent Request for Admissions to the plaintiff. Fed. R. Civ. P. 36. The requests were as follows:

1.

No employee, agent or representative of Young's Electric had any contact, written or oral, with any employee of International Fidelity regarding the Greenville Air Force Base project prior to filing of Young's Electric's Complaint on July 14, 1993.

2.

Young's Electric did not make any claim against the bond issued by International Fidelity on behalf of Met-Pro Corporation for the Greenville Air Force Base project prior to filing of Young's Electric Complaint on July 14, 1993.

3.

At no time did an employee, agent, or representative of International Fidelity commit any intentional act

---

<sup>2</sup>The statute of limitations issue was presented in a supplemental motion for summary judgment -- having been properly raised as an affirmative defense in the defendant's initial responsive pleading. Fed. R. Civ. P. 8(c). The plaintiff did not file a response to this supplemental motion.

which you allege caused you emotional distress.

4.

At no time did an employee, agent, or representative of International Fidelity commit any act which you allege was intended to deceive you.

5.

More than twelve (12) months passed between the time Young's Electric performed the last of its work on the Project and the date it filed this suit.

6.

More than twelve (12) months passed between the time Young's Electric provided material on the Project and the date it filed this suit.

The plaintiff has failed to respond to any of these requests. Therefore, pursuant to Rule 36(a), the above requests are deemed admitted as true and are conclusively established. Fed. R. Civ. P. 36(b). Request numbers 5 and 6 have thus established that the plaintiff failed to comply with the Miller Act's one-year statute of limitations. As such, the action is barred.

#### **STATE LAW CLAIMS**

The plaintiff's state law claims against Fidelity are also subject to dismissal on summary judgment. Based on the Request for Admissions, and lack of response, there is no genuine issue of material fact. The plaintiff has admitted there is no cause of action for emotional distress. Request for Admission Nos. 3 and 4. Furthermore, for the same reasons the federal claims are barred, Fidelity is not liable for the state causes of action of breach of contract and quantum meruit. See Bill Curphy, 207 F.2d at 106; Houston Fire & Casualty Ins. Co., 217 F.2d at 912. The state law causes of action are more appropriately directed to Met-Pro who is not within the jurisdiction of this court.

#### **CONCLUSION**

The plaintiff has filed this action requiring the defendants and the court to spend time on it when it appears that only a little investigation by the plaintiff or his attorney would reveal, if it were not already clear, that the plaintiff's action is not meritorious for any one of several reasons, as discussed above. The defendant has not requested Rule 11 sanctions and only because of that will none be granted.

For the foregoing reasons, the court finds that the defendant's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the \_\_\_\_\_ day of August, 1995.

---

**NEAL B. BIGGERS, JR.**  
**UNITED STATES DISTRICT JUDGE**